

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL and has been accepted for lodgment pursuant to the Practice Direction dated 3 April 2019. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged: Joint List of Witnesses and Objections

File Number: ACT 2 of 2020

File Title: Re Application for authorisation AA1000473 lodged by New South Wales Minerals Council on behalf of itself, certain coal producers that export coal through the Port of Newcastle, and mining companies requiring future access through the Port, and the determination made by the ACCC on 27 August 2020

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



REGISTRAR

Dated: 13/09/2021 3:16 PM

Important information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

COMMONWEALTH OF AUSTRALIA

Competition and Consumer Act 2010 (Cth)



IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 2 of 2020

Re: Application for authorisation AA1000473 lodged by New South Wales Minerals Council on behalf of itself, certain coal producers that export coal through the Port of Newcastle, and mining companies requiring future access through the Port, and the determination made by the ACCC on 27 August 2020

Applicant: Port of Newcastle Operations Pty Limited

Joint list of witnesses to be cross-examined

Lay witnesses

1. Brett Farley Lewis
2. Michael Ryan Phillip Dodd
3. Keiron Rochester
4. Simon Byrnes
5. Gabriella Sainsbury

Expert witnesses

6. Greg Houston
7. Euan Morton
8. Rhonda Smith

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Applicant: Port of Newcastle Operations Pty Limited

PNO's objections to evidence

Expert report of Rhonda Smith dated 22 April 2021	
Paragraph	Objection
[14], whole	Opinion – reasoning underlying conclusion not adequately explained.

Affidavit of Brett Farley Lewis affirmed 30 April 2021	
Paragraph	Objection
[16], 1st sentence <i>("to the effect ... negotiation")</i>	Relevance – document attached to affidavit speaks for itself.

Affidavit of Michael Ryan Phillip Dodd affirmed 6 May 2021	
Paragraph	Objection
[8], 3rd sentence ("However, I had with severalto be resolved.")	Form – sentence does not make sense.
[11], 2nd sentence, from beginning to end of first clause, ending "...producers"	Assertion, hearsay, form.

Affidavit of Dave Poddar affirmed 25 June 2021	
Paragraph	Objection
[4], whole	Submission, assertion.
[10], 2nd sentence	First quote in sentence is an inaccurate summary of the document, which speaks for itself. Second quote in sentence is taken from a paragraph written by Mr Rabe. It is hearsay and not probative.
Annexure DP-5 (referred to at [10])	Hearsay PNO proposes that use of the document be limited to prove that Mr Carmody said the statements in the second paragraph of internal page 3/5 of the document.
Annexure DP-14 (referred to at [19]).	PNO does not object to [19] of Poddar, but does object on relevance and hearsay grounds to the general tender of Annexure DP-14, which covers a wide range of hearsay material not relevant to the matters in dispute.
[20], plus Annexure DP-15	PNO does not object to the tender of Annexure DP-15. It does object, however, to [20] of Poddar, as it inaccurately summarises the contents of DP-15. The spreadsheet at DP-15 shows that coal accounted for 77% of NSW's merchandise export earnings in 2019 <i>for the minerals and fuel sector</i> (not as Mr Poddar deposes, 77% of merchandise export earnings).

Affidavit of Dave Poddar affirmed 25 June 2021	
Paragraph	Objection
Annexure DP-16 (referred to at [21])	PNO does not object to [21] of Poddar, but does object on relevance and hearsay grounds to the general tender of Annexure DP-16, which covers a wide range of hearsay material not relevant to the matters in dispute.
[22], whole	Submission, assertion.
[23], whole	Submission, assertion.
[24], whole	Submission, assertion.

Expert report of Euan Morton dated 25 June 2021	
Paragraph	Objection
[8]-[9] Appendix B All previous Synergies reports included within Appendix B (pages 37-283 of PDF document; HB 1561- 1807)	<p>Relevance, Form, Opinion evidence not in accordance with s 79 <i>Evidence Act 1995</i> (Cth), the Federal Court's Expert Evidence Practice Note or the Harmonised Expert Witness Code of Conduct.</p> <p>The six previous Synergies reports appended to Mr Morton's report were not prepared for the purposes of the present proceeding, and relate to matters that are not in issue in these proceedings. Each was prepared for the National Competition Council in connection with various applications under Part IIIA of the CCA. All but one of these reports were prepared for and relate to Glencore Coal Assets Australia Pty Ltd, not NSWMC. None comply with either the Federal Court's Expert Evidence Practice Note or the Harmonised Expert Witness Code of Conduct. Further, these reports are based on instructions, documents and assumptions which are not established or tendered in these proceedings. The attempt to introduce these reports via Mr Morton's report in this proceedings is only likely to waste time, and result in unfair prejudice to PNO (Previous Synergies Reports Objection).</p> <p>PNO also objects to the parts of Mr Morton's report, identified below, which are based on previous Synergies reports.</p>
[16]	Speculation, Opinion evidence not in accordance with s 79.
[23], 1st sentence (" <i>Existing constraints ... s.2.3.4.</i> ")	Assertion; opinion without reasoning; only reference is previous Synergies report.
[24], final sentence (" <i>In these</i> ")	Assertion; opinion without reasoning; only reference is previous Synergies report.

Expert report of Euan Morton dated 25 June 2021	
Paragraph	Objection
<i>circumstances, ... s 2.3.5]"</i>)	
[26], 1st sentence ("Reflecting this ... after coal.")	Assertion; hearsay.
[26], 2nd sentence ("This is ... after coal.")	Assertion; hearsay.
[60], 2nd sentence	Assertion.
[61], 1st sentence	Assertion.
[74], whole	Assertion; no basis identified for opinions expressed.

Affidavit of Keiron Rochester affirmed 30 June 2021	
Paragraph	Objection
No objections.	

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Applicant: Port of Newcastle Operations Pty Limited

NSWMC's objections to evidence

Affidavit of Simon Byrnes affirmed 15 March 2021	
Paragraph	Objection
[24]	Hearsay – witness in effect gives evidence of representations contained in "sources".
[25]-[28] and the whole of Confidential Annexure SB-3	Hearsay – witness gives evidence of representations contained in SB-3; SB-3 prepared for the purpose of this proceeding and not a business record.
[38(a)], [38(c)] and [38(d)]	Hearsay.
[40(b)]	Hearsay.
[77]	Hearsay.

Affidavit of Simon Byrnes affirmed 30 July 2021	
Paragraph	Objection
[31]	Opinion – witness purports to state what PNO "cannot" do without identifying basis for opinion.
[44]	Form; opinion – witness speculates as to intentions of other persons.